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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

In re KYLE C., a Person Coming Under the
Juvenile Court Law.

THE PEOPLE,

Plaintiff and Respondent,

v.

KYLE C.,

Defendant and Appellant.

D071318

(Super. Ct. No. J238452)

APPEAL from a judgment of the Superior Court of San Diego County, Roderick Ward Shelton, Judge. Affirmed.

David R. Greifinger, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Collette C. Cavalier and Teresa Torreblanca, Deputy Attorneys General, for Plaintiff and Respondent.

As part of a plea bargain, Kyle C. admitted to committing indecent exposure as to one minor victim and misdemeanor sexual battery as to another. The juvenile court adjudged him a ward and imposed several probation conditions. On appeal, he challenges certain of those conditions relating to his use of electronic devices and submission of their contents to search. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND¹

Kyle was charged in 2016 with five sex offenses stemming from two incidents (one in June 2014, the other in April 2015) that involved different victims.

June 2014 Incident

In 2015, victim F.R. reported to authorities an incident involving Kyle that occurred in June 2014, when she was 13 and he was 14. F.R. was sleeping over at Kyle's house as the guest of his twin sister (Sister). While F.R. was watching television, Kyle put his hand down her shirt and attempted to climb on top of her. She borrowed a sweater from Sister to cover herself.

Later, when F.R. went to the bathroom to change clothes, Kyle used his iPod to take photos of her underneath the bathroom door. He showed her the photos, which were blurry and indistinct. F.R. also reported "that Kyle takes photos of his penis," which she saw when she and Sister took his iPod.

Kyle also blocked F.R. as she was on the stairs heading to Sister's bedroom. When she tried to go around him, he pushed her down onto the stairs and pulled down his pants,

¹ Because this appeal follows an admission of guilt, we base our factual summary on the probation officer's report.

exposing his penis. When F.R. tried to get away, Kyle got on top of her and pulled her pants down to her mid-thigh, exposing her buttocks. She thought Kyle was trying to insert his penis into her vagina. F.R. screamed for help, but no one responded. She was able to get away and ran to Sister's room, where she told Sister what Kyle had been doing. Sister apologized for Kyle's behavior, and asked F.R. not to tell Kyle and Sister's mother (Mother).

At some point that day, Kyle asked F.R. to have sex with him. She refused.

The next morning, after Sister left her bedroom and F.R. remained there visiting a social media site on a computer, Kyle entered the room and tried to touch her again. F.R. told him she would tell on him if he didn't stop. Kyle said he didn't care.

When F.R.'s mother picked her up later that morning, F.R. told her about Kyle's conduct. F.R.'s mother confronted Mother, "who appeared disinterested" and responded that she (Mother) "had been molested as a child and it was not a big deal." However, after learning of the later incident (discussed below), Mother stated "that she believed Kyle had done something to" F.R.

In connection with his conduct toward F.R., Kyle was charged with one count of committing a lewd and lascivious act by force on a child under 14 (Pen. Code,² § 288, subd. (b)(1) (count 1)); two counts of committing lewd and lascivious acts on a child under 14 (§ 288, subd. (a) (counts 2 and 3)); and one count of misdemeanor sexual battery (§§ 243.4, subd. (a), 17, subd. (b)(4) (count 5)).

² Undesignated statutory references are to the Penal Code.

April 2015 Incident

On April 15, 2015, while authorities were investigating the June 2014 incident involving F.R., a different victim (15-year-old K.S.) reported to authorities that Kyle exposed his penis to her. Kyle and K.S. lived in the same apartment complex. As K.S. was walking toward the complex's laundry room, Kyle opened his apartment's security screen, called K.S.'s name, and asked her twice to come toward him. When K.S. looked over, Kyle had his penis exposed. K.S. immediately told her mother, who notified the police.

Kyle was charged with one count of misdemeanor indecent exposure (§ 314.1 (count 4)) as to K.S.

Police Interviews

Police questioned Kyle. He denied any wrongdoing in connection with F.R.'s allegations. However, he admitted he showed his penis to K.S. He also "admitted having urges that he had previously had difficulty controlling," but claimed he was on medication that gave him "more control."

When a police officer contacted Kyle's father (Father) to notify him of Kyle's arrest, the officer "was taken aback" by Father's "dismissive and immature" response to the situation. Father accused F.R. and her mother of fabricating the complaint, and minimized Kyle's alleged conduct by stating "it's not like what happened is as bad as a lot of that other stuff going on out there."

Plea Bargain

Kyle and the prosecutor entered into a plea bargain under which Kyle admitted to counts 4 and 5 (indecent exposure as to K.S., and misdemeanor sexual battery as to F.R., respectively). In exchange, the prosecutor dismissed the remaining charges subject to a *Harvey* waiver,³ which allowed the juvenile court to consider the entire background of the case at the dispositional hearing.

Probation Report

Kyle was interviewed by his probation officer and underwent a psychological evaluation. He admitted to exposing his penis to K.S., but denied F.R.'s allegations. However, the probation officer noted that F.R. "was deemed a believable victim by police and the forensic interviewer and it appears as though her allegations against Kyle are truthful."

In his interview with the probation officer, Kyle denied viewing pornography. However, during his psychological evaluation, he admitted "to looking at pornography but 'not a lot.' "

The psychologist observed the presence of "[s]everal risk factors" for recidivism, such as Kyle's "reported past urge to expose himself," there being "possibly more than one victim," and "a high level of familial distress." The probation officer was "concerned that Kyle may not have been particularly truthful with [the psychologist] with regard to

³ *People v. Harvey* (1979) 25 Cal.3d 754.

his sexual impulses." Overall, the psychologist stated that Kyle's risk factors were "considered to be mild."

According to the probation report, Kyle's parents are separated, but Mother "live[s] with the family as a roommate." Father "is responsible for the majority of family responsibilities." The probation officer observed that Father appears "heavily invested in minimizing" and "excusing" Kyle's behavior.

The probation officer recommended that Kyle be granted probation, subject to certain conditions regarding (among other things) his use of electronic devices and submission of their contents to search. He challenges the following conditions in this appeal (hereafter, the electronic search conditions):

"30. The minor shall not knowingly access the Internet or any on-line service through use of an electronic device such as a computer, electronic notepad or cell phone, at any location (including school) without the prior approval by the probation officer.

"31. The minor shall provide all passwords and pass phrases to unlock or unencrypt any file, system, or data of any type, on any electronic devices, such as a computer, electronic notepad, or cell phone, to which the minor has access. Minor shall submit those devices to a search at any time without a warrant by any law enforcement officer, including a probation officer.

"32. The minor shall provide all passwords or pass phrases to any [I]nternet sites or social media sites, such as Facebook, Twitter, SnapChat, or Google+, used or accessed by the minor. When asked by any law enforcement officer, including a probation officer, the minor shall submit those websites to a search at any time without a warrant. The minor shall not knowingly clean or delete his or her Internet browsing activity.

[¶] . . . [¶]

"35. The minor grants consent to any Internet service provider, telecommunications provider, or electronic communications service provider to provide any law enforcement officer, including the probation officer, with subscriber information and content of any data related to or held on behalf of the minor during the probationary period."

Dispositional Hearing

At the dispositional hearing, Kyle's counsel objected that the electronic search conditions lacked a nexus to Kyle's offenses:

"With regard to the [electronic search conditions], there's absolutely no nexus to the misdemeanor crimes that Kyle admitted to, to indicate that such restrictions need to be placed on him with regard to any social media accounts, with regard to any Internet restrictions to the degree that probation is asking for. [¶] These incidents occurred separate from any social media. There[] [are] absolutely no allegations there's been any harassment, sexual harassment or any communication whatsoever between the victims and Kyle via electronic communication via the Internet or via any social media account. So I'd ask the court to strike all those conditions.

[¶] . . . [¶]

"There's absolutely no reason or no indication through the psychological evaluation . . . , as well as Kyle's own interview with probation that he looks at pornography, [or] that he is interested in looking at contacting people online."

The prosecutor responded that the electronic search conditions were appropriate in light of Kyle's youth and the nature of his offenses:

"[S]ex offenses are such that . . . in order to properly supervise [the] minor, probation has to be able to have access to the minor's passwords and access to what the minor is doing online. [¶] Oftentimes when there's a sex offense, either minors are watching pornography that's inappropriate or they are contacting underaged victims online. That is a very common way for people to seek out inappropriate sexual conduct. So in order for probation to be able to properly monitor this minor, it is necessary [for] them to have access

to his passwords as well as to be able to properly monitor what he does online."

The probation officer agreed with the prosecutor's assessment.

After hearing argument, the juvenile court adjudged Kyle a ward of the court (Welf. & Inst. Code, § 602) and placed him in Father's custody, subject to supervision by the probation department and to the electronic search conditions. After imposing the probation conditions, the court asked Kyle and Father, "[W]hat questions do you have at this time?" They both responded that they had none.

DISCUSSION

Kyle challenges the electronic search conditions on two grounds. First, he contends they are not reasonable under the standards enunciated in *People v. Lent* (1975) 15 Cal.3d 481 (*Lent*). Second, he contends they are unconstitutionally overbroad. The Attorney General counters that the conditions are reasonable, and that Kyle forfeited his constitutional challenge by failing to assert it in the juvenile court. We agree in both respects.

I. *Reasonableness Under Lent*

A. *Relevant Legal Principles*

When a court adjudges a juvenile a ward of the court, the court may impose "any and all reasonable conditions that it may determine fitting and proper to the end that justice may be done and the reformation and rehabilitation of the ward enhanced." (Welf. & Inst. Code, § 730, subd. (b).) The juvenile court has broader discretion over juveniles than superior courts do over adults because juveniles are " 'more in need of guidance and

supervision than adults, and because a minor's constitutional rights are more circumscribed.' " (*In re Victor L.* (2010) 182 Cal.App.4th 902, 910.) "Thus, ' " 'a condition of probation that would be unconstitutional or otherwise improper for an adult probationer may be permissible for a minor under the supervision of the juvenile court.' " ' " (*Ibid.*) "In fashioning the conditions of probation, the juvenile court should consider the minor's entire social history in addition to the circumstances of the crime." (*In re Walter P.* (2009) 170 Cal.App.4th 95, 100.)

"Of course, the juvenile court's discretion is not boundless." (*In re Victor L., supra*, 182 Cal.App.4th at p. 910.) Under *Lent*, " '[a] condition of probation will not be held invalid unless it "(1) has no relationship to the crime of which the offender was convicted, (2) relates to conduct which is not in itself criminal, and (3) requires or forbids conduct which is not reasonably related to future criminality" . . . ' " (*People v. Olguin* (2008) 45 Cal.4th 375, 379, quoting *Lent, supra*, 15 Cal.3d at p. 486; see *In re D.G.* (2010) 187 Cal.App.4th 47, 52 ["juvenile probation conditions must be judged by the same three-part standard applied to adult probation conditions under *Lent*"].) "This test is conjunctive—all three prongs must be satisfied before a reviewing court will invalidate a probation term." (*Olguin*, at p. 379.) Thus, "even if a condition of probation has no relationship to the crime of which a defendant was convicted and involves conduct that is not itself criminal, the condition is valid as long as the condition is reasonably related to preventing future criminality." (*Id.* at p. 380.) This standard is met if "[a] condition of probation . . . enables a probation officer to supervise his or her charges effectively" (*Id.* at pp. 380-381.)

"We review the juvenile court's probation conditions for abuse of discretion, and such discretion will not be disturbed in the absence of manifest abuse." (*In re Erica R.* (2015) 240 Cal.App.4th 907, 912.)

B. *Analysis*

Kyle's challenge to the electronic search conditions fails under the first and third *Lent* prongs. As to the first prong (relation to the crime of which he was convicted), the record shows Kyle used an electronic device (his iPod) to photograph F.R. while she was changing clothes in the bathroom. Although Kyle was not convicted of *photographing* F.R. (he admitted to sexually *battering* her), he agreed by virtue of his *Harvey* waiver that the juvenile court could consider this conduct in determining the appropriate disposition. A probation condition that allows searches of electronic devices like the one Kyle used to surreptitiously photograph F.R. relates to the conduct with which Kyle was charged and which he agreed the juvenile court could consider.

The electronic search conditions are also valid under the third *Lent* prong because they reasonably relate to potential future criminality. Kyle has a history of exposing his penis to nonconsenting minors (both F.R. and K.S.). He also had photographs of his own penis on his iPod. We are not so naïve as to believe he did not intend to show those photographs to someone else, either in-person, online, or via text message. Indeed, it is difficult to imagine any *legitimate* purpose for which Kyle would have stored photographs of *his own* penis on an electronic device. The electronic search conditions will facilitate preventing Kyle from engaging in behavior reasonably related to future criminality.

Kyle also admitted he watched pornography. In this day and age, it is reasonable to presume he did so using some type of electronic device. The challenged conditions will facilitate Kyle's rehabilitation by ensuring he does not access or store potentially illegal materials online.

These connections between electronic devices and Kyle's past and potential future sexual misconduct distinguish this case from those on which he relies to support the contention that the electronic search conditions fail under the third *Lent* prong. (See *In re Erica R.*, *supra*, 240 Cal.App.4th at p. 913 ["There is nothing in this record regarding either the current offense [of misdemeanor drug possession] or [the juvenile]'s social history that connects her use of electronic devices or social media to illegal drugs. In fact, the record is wholly silent about [her] usage of electronic devices or social media."]; *In re J.B.* (2015) 242 Cal.App.4th 749, 752, 756 [where juvenile admitted to shoplifting a shirt from a department store and to having a history of marijuana usage, "there [was] no showing of any connection between the minor's use of electronic devices and his past or potential future criminal activity"].) In any event, our court has upheld similar probation conditions under the third *Lent* prong even when the underlying offense did not involve the use of electronic devices. (See *In re George F.* (2016) 248 Cal.App.4th 734, 740-741, review granted Sept. 14, 2016, S236397.)

More generally, the record shows a strong need to closely supervise Kyle. First, Father, who is his primary caregiver, appears dismissive of the seriousness of Kyle's repeated sexual misconduct. Second, Kyle misled his probation officer regarding his pornography-viewing habits. Finally, Kyle's probation officer suspected he was not

forthcoming with the psychologist about his inability to control his sexual impulses. In light of Kyle's apparent lack of candor, the electronic search conditions will be necessary tools in ensuring Kyle's successful rehabilitation.

II. *Forfeiture of Constitutional Overbreadth Challenge*

In addition to his *Lent* challenge, Kyle also contends on appeal that the electronic search conditions are unconstitutionally overbroad. He acknowledges he "did not use the word '[C]onstitution' " in his objection below, but argues "he implicitly raised the objection by stating that the conditions bore no relation to his crimes or future criminality." We disagree. Nothing in the record indicates Kyle intended the wording of this objection to refer to anything other than *Lent*'s standard for determining reasonableness. Kyle's failure to raise this constitutional challenge below forfeited it on appeal.

"Ordinarily, a criminal defendant who does not challenge an assertedly erroneous ruling of the trial court in that court has forfeited his or her right to raise the claim on appeal." (*In re Sheena K.* (2007) 40 Cal.4th 875, 880 (*Sheena*).) This rule applies to both constitutional and *Lent* reasonableness challenges. (*Sheena*, at pp. 880-881; *People v. Welch* (1993) 5 Cal.4th 228, 234-238.) " 'The purpose of this rule is to encourage parties to bring errors to the attention of the trial court, so that they may be corrected. [Citation.]' " (*Sheena*, at p. 881.)

In *Sheena*, the California Supreme Court recognized an exception to the general forfeiture rule for *facial* challenges to the constitutionality of probation conditions. (*Sheena*, *supra*, 40 Cal.4th at pp. 887-889.) The court reasoned that whereas a trial court

is "characteristically . . . in a considerably better position than the Court of Appeal to review and modify a . . . probation condition that is premised upon the facts and circumstances of the individual case," a facial challenge that requires only "the review of abstract and generalized legal concepts" is a "task that is well suited to the role of an appellate court." (*Id.* at p. 885.)

Applying these principles, the *Sheena* court found the defendant had not forfeited her challenge to a probation condition that she "not 'associate with anyone disapproved of by probation' " (*Sheena, supra*, 40 Cal.4th at p. 880) because her challenge presented "a pure question of law"—whether, *in the abstract*, such a condition was overbroad without a knowledge requirement (*id.* at pp. 885, 888). But the *Sheena* court issued this caveat:

"We caution, nonetheless, that our conclusion does not apply in every case in which a probation condition is challenged on a constitutional ground. As stated by the court in [*In re Justin S.* (2001) 93 Cal.App.4th 811], we do not conclude that 'all constitutional defects in conditions of probation may be raised for the first time on appeal, since there may be circumstances that do not present "pure questions of law that can be resolved without reference to the particular sentencing record developed in the trial court." [Citation.] In those circumstances, "[t]raditional objection and waiver principles encourage development of the record and a proper exercise of discretion in the trial court." [Citation.]' (*Justin S., supra*, 93 Cal.App.4th at p. 815, fn. 2.) We also emphasize that generally, given a meaningful opportunity, the probationer should object to a perceived facial constitutional flaw at the time a probation condition initially is imposed in order to permit the trial court to consider, and if appropriate in the exercise of its informed judgment, to effect a correction." (*Sheena, supra*, 40 Cal.4th at p. 889.)

We find unpersuasive Kyle's assertion that his constitutional challenge presents "a pure question of law because the facts are undisputed." To the contrary, certain of his

assertions on appeal—e.g., that "[n]othing in the record suggests [he] used the Internet or . . . any electronic device for any activities related to his crimes or for viewing pornography"—demonstrate the existence of factual disputes. (In fact, the record disproves this particular assertion.) As this illustrates, Kyle's challenge to the electronic search conditions is not a facial challenge because he does not contend these conditions will *always* be overbroad; rather, he contends they are overbroad only *as applied to him under the facts of this case*. Therefore, the challenge does not fall within *Sheena's* facial-challenge exception to the forfeiture rule.

We reject Kyle's request that we exercise our discretion to consider his constitutional challenge—despite its forfeiture—due to the claimed need for "[a]ppellate guidance" in light of the novelty of electronic search conditions. As Kyle acknowledges, our court has already issued published decisions on the topic (see, e.g., *People v. Nachbar* (2016) 3 Cal.App.5th 1122, review granted Dec. 14, 2016, S238210; *In re George F.*, *supra*, 248 Cal.App.4th 734), and the issue is presently under review by the California Supreme Court (see, e.g., *In re Ricardo P.* (2016) 241 Cal.App.4th 676, review granted Feb. 17, 2016, S230923).

Finally, we are mindful—particularly in light of the prevalence of electronic devices, social media platforms, and online content and storage—of the potential invasiveness of an electronic search condition that requires disclosure of passwords. However, because many electronic devices and online platforms are (or can be) password-protected, it would be virtually impossible without a password-disclosure requirement to ensure compliance with an otherwise appropriate electronic search

condition. Moreover, concern regarding the potential invasiveness of electronic search conditions is ameliorated by the restriction against arbitrary, capricious, or harassing probation searches. (See *People v. Woods* (1999) 21 Cal.4th 668, 682; *People v. Cervantes* (2002) 103 Cal.App.4th 1404, 1408.)

DISPOSITION

The judgment is affirmed.

HALLER, J.

WE CONCUR:

McCONNELL, P. J.

NARES, J.